

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICHAEL D. CLARKE, )  
 )  
Petitioner, ) Case No. C04-2093-JCC-JPD  
 )  
v. )  
 ) REPORT AND RECOMMENDATION  
JAMES C. SPALDING, )  
 )  
Respondent. )  
\_\_\_\_\_ )

**I. INTRODUCTION**

Petitioner has filed a *pro se* petition for writ of *habeas corpus* challenging his 1995 convictions in King County Superior Court. After reviewing the parties pleadings and the available record, this Court concludes that petitioner’s claims are time barred. Accordingly, the Court recommends that the petition be dismissed.

**II. FACTS AND PROCEDURAL HISTORY**

On June 30, 1995, King County Superior Court entered a judgment and sentence against petitioner for one count each of first degree murder, attempted first degree murder, and second degree assault. Dkt. No. 19, Ex. 10.<sup>1</sup> Petitioner stabbed one victim to death in her trailer home and stabbed and beat her nine-year-old niece. *See* Ex. 14; *State v. Clarke*, 86 Wash. App. 447, 448-49 (1997). Upon conviction, the trial court imposed “exceptional

<sup>1</sup>References to the state court record are hereinafter referred to only by their exhibit number.

01 sentences of 600 months for the first degree murder conviction and 582 months for the  
02 attempted first degree murder conviction.” Ex. 14; *Clarke*, 86 Wash. App. at 448-49. The  
03 sentences were to run concurrently. Ex. 10.

04 A. State Direct Review Proceedings

05 Proceeding through counsel, petitioner raised a direct appeal to the Washington Court  
06 of Appeals. Exs. 11-14; *see supra Clarke v. State*. Among other things, petitioner argued that  
07 the trial court had abused its discretion by allowing certain evidence at trial, including a past  
08 robbery conviction. He also challenged the trial court’s decision on several sentence-related  
09 issues. Ex. 11. On May 19, 1997, in a partially published decision, the court rejected  
10 petitioner’s arguments and affirmed his conviction. Ex. 14; *See supra Clarke v. State*.  
11 Petitioner sought direct review by the Washington Supreme Court, but his request was denied  
12 on November 5, 1997. Exs. 15, 16. On November 20, 1997, the Court of Appeals issued its  
13 certificate of mandate. Ex. 17. Petitioner did not file a petition for writ of *certiorari* with the  
14 Supreme Court of the United States. As a result, the petitioner’s conviction became “final” for  
15 purposes of 28 U.S.C. § 2244(d) on February 2, 1998, which was ninety days after the  
16 Washington Supreme Court denied his petition for review. *Bower v. Roe*, 188 F.3d 1157,  
17 1159 (9th Cir. 1999).

18 B. State Collateral Proceedings

19 On June 25, 2003, petitioner filed a personal restraint petition (“PRP”) with Division I  
20 of the Washington Court of Appeals that raised at least seven claims for relief.<sup>2</sup> Ex. 18.  
21 Despite concerns regarding the timeliness of the appeal, the court reviewed the PRP on the  
22 merits but found it to be frivolous and dismissed the petition. Ex. 19. Petitioner sought  
23 discretionary review of the dismissal in the Washington Supreme Court. Ex. 20-24. The court  
24 observed that the PRP was time barred, but nevertheless determined that the motion raised new

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26 <sup>2</sup>The petition appears to have been filed in the Snohomish County Superior Court which  
was subsequently transferred to the Court of Appeals. Ex. Nos. 18, 19.

01 grounds for relief and therefore dismissed it on those grounds on December 15, 2003. Ex. 25.

02 It also appears that petitioner filed a separate PRP directly with the Washington  
03 Supreme Court on June 25, 2003, that raised twelve claims for relief. Ex. 27. The Supreme  
04 Court transferred the petition to the Court of Appeals and on November 12, 2003, the Court of  
05 Appeals dismissed that petition as time barred. Ex. 30.

06 On October 5, 2004, petitioner filed a 28 U.S.C. § 2254 petition for writ of *habeas*  
07 *corpus* with this Court.<sup>3</sup>

### 08 III. CLAIMS FOR RELIEF

09 Petitioner raises four claims in his petition. First, he argues that there was insufficient  
10 evidence to sustain his conviction. Second, he argues that the trial court erred by admitting  
11 prejudicial evidence that was over ten years old. Petitioner's third argument appears to relate  
12 to his second, but specifically asserts that the prosecutor erred by asking him about the facts  
13 surrounding a ten-year-old robbery conviction. Fourth, petitioner argues that the trial court  
14 erroneously commented on the evidence when it instructed the jury on the definition of  
15 "grievous bodily harm." Dkt. Nos. 7, 11.

16 Respondent's answer raises several procedural arguments. He argues that the entire  
17 petition should be dismissed as time barred, that the petitioner procedurally defaulted on his  
18 first claim because it never was presented properly to the Washington Supreme Court, and that  
19 none of petitioner's claims present adequate grounds for which § 2254 habeas relief can be  
20 granted and that they lack merit. Dkt. No. 18.

21 As discussed below, the Court recommends all of petitioner's claims be dismissed as  
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23 <sup>3</sup>A 28 U.S.C. § 2254 petition is deemed filed at the time the prisoner delivers it to  
24 prison authorities for mailing to the clerk of the court. *Houston v. Lack*, 487 U.S. 266 (1988);  
25 *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001); *Anthony v. Cambra*, 236 F.3d 568, 575  
26 (9th Cir. 2000) (applying mailbox rule to state petition). Here, the prison mail stamp on the  
petition is dated October 5, 2004. This is also the date petitioner signed and dated his petition.  
*See* Dkt. No. 1.

01 time barred.

#### 02 IV. DISCUSSION

##### 03 A. AEDPA's Statute of Limitations Bars Petitioner's Claims

04 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No.  
05 104-132, 110 Stat. 1214, § 105 (1996), governs petitions for *habeas corpus* filed by prisoners  
06 who were convicted by state courts. 28 U.S.C. § 2254 (1996). AEDPA provides for a one-  
07 year statute of limitations for § 2254 actions challenging state-court convictions. *See* 28  
08 U.S.C. § 2244(d)(1) (1996). The statute of limitations applies to petitioners whose state-court  
09 judgments became final prior to the date AEDPA was signed into law – April 24, 1996 – but  
10 grants them a one year grace period in which to file. *See Carey v. Saffold*, 536 U.S. 214, 217  
11 (2002); *Patterson v. Stewart*, 251 F.3d 1243, 1245 (9th Cir. 2001). Thus, for petitioners  
12 whose judgments became final prior to April 24, 1996, the period to file expired on April 24,  
13 1997. *Patterson*, 251 F.3d at 1245.

14 Here, there is no question that petitioner filed his petition after the expiration of the  
15 statute of limitations. He did not file his § 2254 petition until October 5, 2004, more than five  
16 years after the AEDPA's statute of limitations had expired for him. Dkt. Nos. 7, 11.  
17 Petitioner's suit is therefore barred by AEDPA's one year statute of limitations. The only  
18 circumstances under which the petition would not be time barred is if the statute of limitations  
19 was tolled.

##### 20 B. AEDPA's Tolling Provisions Do Not "Save" Petitioner's Claims From 21 Being Time-Barred

22 AEDPA contains a provision that tolls the statute when a state collateral attack is filed.  
23 Additionally, AEDPA's statute of limitations is subject to equitable tolling under certain  
24 circumstances. Neither of these provisions, however, save this petition from being time barred.  
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01                   1.       Statutory Tolling

02           The AEDPA's statute of limitations may be tolled for "[t]he time during which a  
03 properly filed application for State post-conviction or other collateral review with respect to  
04 the pertinent judgment or claim is pending[.] " 28 U.S.C. § 2244(d)(2). Thus, a PRP that is  
05 properly filed prior to the running of the statute tolls it. In this case, however, petitioner filed  
06 his first PRP in June 2003, more than four years after AEDPA statute of limitations had  
07 expired. Dkt. Nos. 18, 27. As a result, AEDPA's statutory tolling provisions do not apply.

08                   2.       Equitable Tolling

09           AEDPA's statute of limitations is also subject to equitable tolling. *Pace v.*  
10 *DiGuglielmo*, \_\_\_ U.S. \_\_\_ (2005), available at 2005 WL 957194. The Supreme Court,  
11 however, has indicated that equitable tolling is only applicable in very limited circumstances.  
12 To succeed on an equitable-tolling argument, the petitioner must show (1) that he has been  
13 pursuing his rights diligently; and (2) that some extraordinary circumstances stood in his way.  
14 *DiGuglielmo*, 2005 WL 957194, at \*6; accord *Alvarez-Machain v. United States*, 107 F.3d  
15 696, 701 (9th Cir. 1997) (recognizing that equitable tolling is typically available in suits against  
16 the United States) (internal citations omitted).

17           Here, petitioner has alleged no "extraordinary circumstances" beyond his control that  
18 have made it "impossible" for him to file a timely petition. In addition, no such evidence is  
19 apparent from the Court's review of the record. Thus, because the petition was filed after the  
20 running of the statute of limitations, and because no evidence justifies statutory or equitable  
21 tolling, petitioner's claims should be dismissed as time barred. By virtue of the fact that the  
22 Court finds that this petition is barred by AEDPA's statute of limitations, it is not necessary to  
23 address the underlying substance of his arguments.

**V. CONCLUSION**

Petitioner filed his 28 U.S.C. § 2254 petition for writ of *habeas corpus* more than five years after the expiration of the AEDPA's statute of limitations. In addition, petitioner has not demonstrated that the statute should be tolled. As a result, the Court recommends that the petition be dismissed as time barred. A proposed order accompanies this Report and Recommendation.

DATED this 17th day of June, 2005.

  
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JAMES P. DONOHUE  
United States Magistrate Judge